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No. 251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ATLANTIC CITY ELECTRIC COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Petitions for writs of certiorari to the United States Court of Claims have been filed by taxpayers in *Idaho Power Company* v. *United States* (No. 236), *General Public Utilities Corporation* v. *United States* (No. 226), and in the instant case. The three are companion cases, involving a common issue, decided by the Court of Claims on May 7, 1958. In addition to the identical

issue in the three cases, the facts of the *Idaho Power* case raise what the parties have termed a second issue. The Court of Claims decided both issues against Idaho Power Company and that taxpayer has petitioned for certiorari on both.

The Solicitor General on behalf of the United States has filed Briefs in Opposition to the petitions of Atlantic City Electric Company and General Public Utilities Corporation, which involve only the first and principal issue. In answer to the petition of Idaho Power Company he has filed a "Memorandum for the United States" opposing the grant of a writ on the first issue, but joining with petitioner in asking this Court to grant a writ on the second issue.

Petitioner herein submits that both issues should be reviewed by this Court, and that it would create confusion in the law for this Court to grant a review of the second issue in the *Idaho Power* case without granting the writ as to the principal issue which is common to all three cases. This is true for the reason that if the common issue has been wrongly decided by the court below the second issue, unique in the *Idaho Power* case, will not arise.

The issue common to all three cases is whether the definition of the term "dividend" in 1939 Code Section 115(a) with respect to the distributing corporation is modified or limited by Section 115(c) which provides for the manner in which that dividend shall be taxed to the shareholder-distributees.

The second issue, present only in the *Idaho Power* case because of a difference in the facts, arises only if it is first held, as has the court below, that Section 115(c) modifies the term "dividend" as defined in

Section 115(a). If that is correct, and only in that event, the collateral question presented in *Idaho Power* is whether a cash distribution to stockholders out of corporate earnings and profits, in a nontaxable share-for-share exchange of preferred stock, is taxable *to the stockholders* under Section 115(c) as "capital gain," rather than as ordinary income, and therefore not a "dividend" from the standpoint of the distributing corporation.

It is readily apparent that if the provisions of Section 115(c), taxing certain distributions to shareholders out of corporate earnings and profits at capital gain rates, is not a modification of the term "dividend" as defined in Section 115(a) with respect to the distributing corporation, there is no second issue presented.

Thus, if this Court were to grant the limited writ of certiorari requested by the Solicitor General in *Idaho Power*, it would be tantamount to an affirmance of the decision below on the first issue without ever having heard that issue, because the very existence of the second issue depends solely on the correctness of the lower court's decision on the first issue. Therefore, it is respectfully submitted that this Court should not grant certiorari in *Idaho Power* limited to a collateral issue which cannot exist if the court below is wrong on the first issue, but instead should undertake to review the broad question of what constitutes a "dividend" from the standpoint of the distributing corporation—the basic question which is common to all three cases.

CONCLUSION

This Court should grant the petitions for writs of certiorari in all three cases.

Respectfully submitted,

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